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Nos. 94-1941 and 94-2107

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE SOUTH CAROLINA INSTITUTE OF LEADERSHIP FOR WOMEN IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE

The South Carolina Institute of Leadership for Women (SCIL) at Converse College in Spartanburg, South Carolina, commenced in 1995 to provide young women the opportunity to receive publicly supported single-gender education. SCIL is designed to achieve, through a single-gender leadership program for women, benefits comparable to the benefits The Citadel Corps of Cadets achieves through a single-gender leadership program for men. SCIL's 1995-96 class includes twenty-two young women who have enrolled in the program to obtain the knowledge, skills, character, and experiences which will allow them to take positions of leadership in the private and public arena, including the military. These twenty-two young women have a substantial interest in the outcome of this case. As will be discussed more fully herein, the controlling principles that are present in *United States v. Commonwealth of Virginia, et al.*, 44 F.3d 1229 (4th Cir. 1995),

cert. granted, 116 S. Ct. 281 (1995) are extremely important to these young women and to their continued right to have the opportunity to participate in this unique, publicly supported single-gender educational program. Therefore, the students of SCIL submit this brief as amicus curiae to bring to the Court's attention their interest in this review of the VMI litigation and to urge affirmance of the decision of the court of appeals.[1]

STATEMENT

Converse College, a private four-year women's college, was founded in 1889. For one hundred six years, Converse College has been preparing women for leadership. Recruiting publications assert that a Converse College education prepares young women "for informed and responsible decisionmaking, reasoned and humane

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[1] The written consents of the parties to the submission of this amicus curiae brief have been filed with the Clerk of the U.S. Supreme Court pursuant to Sup. Ct. R. 37.3.

action, and significant and influential achievement." 1994-1995 Converse College Catalog at 7-8. The development of leadership has always been an important and integral aspect of the educational program at Converse College. In 1993, Converse College began developing a more formal and focused approach to its leadership education, which resulted in the establishment of a leadership curriculum.

In 1993, the South Carolina General Assembly was also addressing single-gender higher education in South Carolina. In May 1993, the General Assembly adopted a resolution affirming a "policy of choice" which included offering citizens of South Carolina the option of single-gender higher education. "South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such

programs." S.C. H. Con. Res. 4170, 110th Leg., 1st Sess. (1993). To deal squarely with the fact that South Carolina's state-supported educational institutions did not include such an option, the General Assembly established a 10-member committee and directed them to formulate recommendations for the General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women. The committee was charged with preparing a report and submitting it to the General Assembly at the beginning of the 1994 Session. A report was prepared and submitted in January 1994. This report concluded that any single-gender educational opportunity for women should achieve the same educational objectives which are provided for the young men who attend The Citadel. January 1994 Report, Legislative Committee to Study the Provision of Single-Gender Educational Opportunities for Women.

In April of 1995, the court of appeals held that "[i]f [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable." *Faulkner v. Jones*, 51 F.3d 440, 448 (4th Cir. 1995).

The South Carolina General Assembly, as part of the 1995-96 General Appropriations Act, passed a resolution reaffirming South Carolina's commitment to single-gender education, finding that opportunities to attend a single-gender college fulfill an important and legitimate state objective and stating that the single-gender offerings need not be identical in form and detail but should be designed to achieve substantively comparable outcomes. 1995 S.C. Acts 145, Part II, §§ 95(A)-(B).

Simultaneous with the passage of the resolution, the South Carolina General Assembly approved the concept of SCIL by enacting legislation providing for long-term funding for SCIL. *Id.* Included in this funding amendment

to the 1995-96 General Appropriations Act was language that stated: "This section takes effect upon approval of this act by the Governor, but shall be void and of no effect if the United States Supreme Court issues a ruling which reverses the holding in *U.S. v. Commonwealth of Virginia*, 44 F.3d 1229, 1232, 1238 (4th Cir. 1995)." Journal of the Senate of the State of South Carolina, No. 67 (May 4, 1995).

Thereafter, an agreement was entered into in June of 1995 between the State of South Carolina and Converse College establishing SCIL. South Carolina desired to establish a state-supported leadership institute for women. Converse College desired to offer a state-supported leadership institute as part of the leadership program available to its undergraduate students.

The mission of SCIL is to prepare women, as The Citadel mission prepares men, "for post-graduate positions of leadership through academic programs of excellence"

supported by an environment that fosters the "growth and development of character, physical fitness, moral and spiritual principles, thereby preparing its students to meet the requirements of citizens and especially of leaders." South Carolina's Proposed Remedial Plan.

SCIL was designed by experts in higher education, who concentrate on women's education and development, to provide college-age women the benefits of single-gender education, discipline, and leadership training that The Citadel provides to college-age men.[2] SCIL's mission and goals parallel those of The Citadel. As with The Citadel,

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[2] Students who are enrolled in SCIL must complete the academic undergraduate program at Converse College, plus complete a total of four courses in science, eight courses in health and physical education, and calculus. Additionally, the students must complement their academic program by required ROTC participation, which includes summer experiences and special residential lief program requirements. Further, SCIL students complete a twenty-one semester hour sequence of academic courses called the Converse Leadership Program.

single-gender education forms the core of the SCIL experience.

The enrollment of SCIL for the 1995-96 academic year includes twenty-two young women, both freshmen and transfer students, who have all exhibited achievement in academic and physical fitness, have exhibited a potential for leadership, and are extremely qualified and capable to meet the demands of SCIL.[3] If given the opportunity, they each have the ability and commitment to successfully complete the program and to be prepared to "meet the requirements of citizens and especially of leaders." South Carolina's Proposed Remedial Plan.

However, if the principle of a publicly funded single-gender educational program for women that is substantively comparable to the publicly funded single-gender educational program for men, is not upheld by this Court as being a

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[3] See Appendix A for detailed descriptions of the twenty-two students who enrolled in SCIL in the fall of 1995.

legitimate governmental objective and constitutional, then the State of South Carolina is released from its obligation to provide funds to Converse College to support SCIL, and Converse College is under no further obligation to continue to operate the program. Agreement between the State of South Carolina and Converse College, June 5, 1995, para. 9. Therefore, what occurs in this review is of utmost importance to the students enrolled in SCIL and to future college-age women in South Carolina who may desire to pursue similar educational experiences.

SUMMARY OF ARGUMENT

Single-gender educational opportunities have been found by the Fourth Circuit Court of Appeals to be beneficial for both men and women. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 897-98 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("VMI I"); *see also United States v. Commonwealth of Virginia*, 44 F.3d

1229, 1239 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995) ("VMI II").[4]

In VMI I, Judge Niemeyer found that the evidence in the case "amply demonstrated that single-genderedness in education can be pedagogically justifiable . . . . [W]hile the data support a pedagogical justification for a single-sex education, they do not favor either sex. Both men *and* women appear to have benefitted from a single-sex education in a materially similar manner." VMI I, 976 F.2d at 897-898 (Emphasis in original). In VMI II, the court held "that single-gender education at the college level is beneficial to both sexes is a fact established in this case." VMI II, 44 F.3d at 1238.

The Fourth Circuit Court of Appeals has also held that the single-gender educational programs offered at Virginia Military Institute (VMI) and Virginia Women's Institute for

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[4] For sake of conciseness, cites hereinafter to these two cases will be referred to as VMI I and VMI II.

Leadership (VWIL) pass constitutional scrutiny because, although they are not identical, they are substantively comparable.[5] VMI II, 44 F.3d at 1241.

The Fourth Circuit has further stated, on several occasions, that the principles of VMI I and VMI II apply to the facts of the controversy involving The Citadel and the issue of whether the State of South Carolina's parallel program, SCIL, is substantively comparable to The Citadel's. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993); *Faulkner v. Jones*, 51 F.3d 440, 447, 448 (4th Cir. 1995).

Consequently, the ruling of this Court on the writ of certiorari before it not only affects the concept of single-

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[5] The court qualified this holding by stating that the VWIL program, which at that time was at its incipiency, be undertaken with a persistently high level of commitment by the State of Virginia. VMI II, 44 F.3d at 1241. Since that decision was rendered on January 26, 1995, both VWIL at Mary Baldwin College and SCIL at Converse College are proving to be successful single-gender educational programs.

gender education in the State of Virginia and the State's right to designate it as an important governmental objective, but also directly affects and controls the existence and continuation of publicly supported single-gender education in South Carolina that exists for both sexes.

The reversal of VMI II would undermine and threaten the rights of young women to choose to participate in a unique single-gender educational experience that is provided to young men in South Carolina. Despite the fact that the State of South Carolina has enthusiastically come forward to establish a publicly funded single-gender educational opportunity for its young women, if the concept of a constitutionally permissible, substantively comparable alternative is not approved, that opportunity will cease to exist.

ARGUMENT

A. SINGLE-GENDER EDUCATION IS BENEFICIAL TO BOTH SEXES AND PUBLIC SUPPORT OF SINGLE-GENDER EDUCATIONAL PROGRAMS CONSTITUTES A LEGITIMATE AND IMPORTANT GOVERNMENTAL OBJECTIVE.

Petitioner and amici curiae filing briefs in support of petitioner's argument that substantively comparable educational programs are unconstitutional would have this Court ignore the well-reasoned analysis of the district court and the court of appeals and find a constitutional violation where in fact one does not exist. A review of the arguments of the petitioner and the supportive amici curiae do nothing more than establish that the groups are fundamentally opposed to the concept that single-gender education is beneficial and public support of it is justifiable. As an example, the amici brief filed in support of petitioner by twenty-six private women's colleges begins its analysis with an endorsement of single-gender education (Brief of Twenty-Six Private Women's Colleges as Amici

Curiae in Support of Petitioner at 2-3), yet concludes that only *private* single-gender education is beneficial and VMI II, which held that single-gender education can constitute a legitimate governmental objective, should be reversed.

Beginning with Judge Kiser's opinion in *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), the District Court of the Western District of Virginia and the Fourth Circuit Court of Appeals have carefully considered the evidence presented with regard to the benefits of single-gender education and have concluded that single-gender education at the college level is beneficial to both sexes and that the option of a publicly supported single-gender college education may be given to the citizens by a state. VMI II, 44 F.3d at 1239.

> Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many. Although there remains some disagreement among the experts about the extent of the

> benefits of single-gender education, it is not our role to resolve that issue. It is enough that there is a growing consensus in the professional community that a sexually homogeneous environment yields concrete educational benefits. Thus, we should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education.

Id. at 1239.

The court below has carefully considered the constitutionality of publicly supported single-gender education and has found that substantively comparable programs provide opportunities for men and women that pass Equal Protection Clause constitutional scrutiny.

The State of Virginia chose to provide a "parallel program" at Mary Baldwin College in Staunton, Virginia, and therefore to establish the Virginia Women's Institute for Leadership. The district court subsequently reviewed the plan and approved it. *United States v. Commonwealth of Virginia*, 852 F. Supp. 471 (W.D. Va. 1994). The

Fourth Circuit Court of Appeals then affirmed the district court's decision by review of the plan pursuant to a modified constitutional scrutiny test peculiar to this case. *See, e.g., Craig v. Boren*, 429 U.S. 451 (1976).

> Application of this traditional test . . . to a case where the classification is not directed per se at men or women, but at homogeneity of gender, presents a unique problem, because once the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny. The second prong of the test thus would provide little or no scrutiny of the effect of a classification directed at homogeneity of gender. Thus, in order to measure the legitimacy of a classification based on homogeneity of gender against the Equal Protection Clause, we conclude that we must take the additional step of carefully weighing the alternatives available to members of each gender denied benefits by the classification.

VMI II, 44 F.3d at 1237. In other words, the Fourth Circuit Court of Appeals strove to determine whether "excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to

those they are denied." *Id.* at 1239-1240. The court ultimately concluded that Virginia's plan provided "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 1240. These substantively comparable benefits have been found to be constitutional and not to violate the Equal Protection Clause, and the court's finding on this issue should be affirmed.

The dissent in VMI II roundly criticized the majority's conclusion, as have petitioner and amici curiae in support of petitioner. Focusing on the "substantial relationship prong" of the intermediate scrutiny test, the dissent essentially agreed with the majority by saying that:

> no such arrangement (of separate single-gender schools) could be found *substantially related* to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantively* equal across the board of the relevant criteria for evaluating educational institutions.

VMI II, 44 F.3d at 1249 (Phillips, J., dissenting). The dissent then attacked the criteria used by the majority,

however, saying it should have employed the standard enunciated in *Sweatt v. Painter*, 339 U.S. 629, 633-634 (1950) (requiring "substantial equality in educational opportunities" to justify separate state-supported law schools for white and black students, and not finding it upon considering both tangible resources such as "scope of library" and intangible resources such as "position and influence of the alumni," "traditions and prestige"). The rationale for using this criteria, the dissent claimed, is that "the proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice." VMI II, 44 F.3d at 1249 (Phillips, J., dissenting). Thus, the dissent concluded that VWIL can never provide "substantially equal" benefits as VMI provides because it was not started at the same time, it does not have the same prestige, alumni network, etc. Indeed, the dissent then offered as a "paradigm" for compliance with such a standard:

> simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as tradition, prestige and alumni influence -- as to which each starts with none.

Id. at 1250.

The flaws in the dissent's logic are numerous. First, *Sweatt v. Painter* addresses racial discrimination, not gender discrimination, and thus the classification at issue in that case was subject to the most exacting type of scrutiny -- strict scrutiny. Though the dissent recognized this fact, it merely brushed that consideration aside saying "I see no reason why the same requirement of *substantial* equality of benefits that was thought at one time to justify separate-but-equal schools for the different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit

separate-but-equal arrangements." VMI II, 44 F.3d at 1249 (Phillips, J., dissenting)(emphasis in original).

The dissent in VMI II and the arguments of petitioner and supporting amici curiae urge this Court to reject the reasoned Fourth Circuit analysis and find that the single-gender educational programs that exist at VMI and VWIL violate the Equal Protection Clause. These arguments are not based on the law of this Court and should be rejected.

B. THE PRINCIPLES OF VMI I AND VMI II AND THEIR PRECEDENTIAL VALUE HAVE BROAD IMPLICATIONS FOR OTHER INSTITUTIONS OF HIGHER LEARNING AND THE STUDENTS WHO ARE ENROLLED IN THEM, AND THESE IMPLICATIONS SHOULD BE CONSIDERED BY THIS COURT.

It is undisputed that similarities exist between the issues addressed in the VMI litigation and issues that exist in The Citadel litigation. The Fourth Circuit Court of Appeals has stated in at least two decisions that the VMI principles of law were controlling in The Citadel litigation. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993);

Faulkner v. Jones, 51 F.3d 440, 447, 448 (4th Cir. 1995). The parties and the Court in The Citadel litigation have agreed that due to the similarities certain VMI conclusions of law would apply in The Citadel litigation. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994).

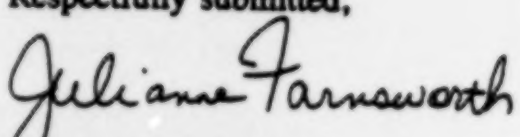
As a result of this overlap of principles and similarity of issues, SCIL, as amicus curiae in this case, submits to the Court that the implications of this decision are broad and far reaching and not only will dictate the course of events for present and future students of VMI and VWIL, but also for other young men and women across the country. Just as Nancy Mellette, in her amicus brief supporting the petitioner, asserts that she has a "very substantial" interest in the outcome of the Court's review of the VMI decision (Amicus Brief of Nancy Mellette in Support of Petitioner at 1), the twenty-two SCIL students assert that they have an even stronger interest than Nancy Mellette or the other amici curiae who filed briefs in

support of the reversal of the VMI II decision in the outcome of this Court's review of this case. The twenty-two SCIL students, unlike Nancy Mellette, or Lieutenant Colonel Rhonda Cornum, USA, or the American Association of University Professors, are not prospective participants, past participants, or interested observers in an educational program, but are actual participants in an on-going educational program whose continued existence depends specifically on whether this Court affirms the VMI II holding that substantively comparable single-gender educational programs are constitutionally permissible. Consequently, due to the overlap of the controlling legal principles and the extremely substantial interest these twenty-two students at SCIL have in this case, this amicus curiae respectfully urges the Court to affirm the findings of VMI II.

CONCLUSION

For the reasons stated in this brief, amicus curiae South Carolina Institute of Leadership for Women requests that this Court affirm the judgment of the court of appeals.

Respectfully submitted,



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